HAFIZI SUFRI JOHARI v. PP

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
RHODZARIAH BUJANG JCA
NOR BEE ARIFFIN JCA
[CRIMINAL APPEAL NO: Q-06A(M)-21-09-2017]
1 JULY 2019

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B – Trafficking in cannabis – Appeal against conviction and sentence – Break in chain of evidence – Allegation of – Whether there was serious doubt on identity of drugs seized – Whether conviction safe – Whether there ought to be order of discharge and acquittal*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Trafficking in cannabis – Break in chain of evidence – Allegation of – Whether there was serious doubt on identity of drugs seized – Whether conviction safe – Whether there ought to be order of discharge and acquittal – Dangerous Drugs Act 1952, s. 39B*

The appellant was charged and convicted by the High Court for trafficking in 956.06g of cannabis under s. 39B of the Dangerous Drugs Act 1952 ('DDA') and sentenced to death for the said offence. The discovery of the said drugs was upon a raid conducted at the appellant's house. The raiding party had to force open the front door of the house by kicking it open following the appellant's refusal to open it. A search of the master bedroom of the house revealed the said drugs in one transparent plastic packet on top of a sink in the bedroom and in another translucent plastic as well as 27 transparent plastic packets which were found in a box. In another room facing the bedroom, another 30 plastic packets containing the drugs were found in a drawer. Based on the conduct of the appellant in refusing to open the door, that he was seen running upstairs, and that he had looked frightened when the drugs were found in the house, the High Court Judge ('HCJ') held that the appellant had possession of the same. The HCJ was satisfied that the element of possession, namely, knowledge of the nature of things possessed, the power of disposal over the things and the consciousness of possession of the things had been established. However, on the ingredient of the charge that the drugs found was dangerous drugs, as stated in the First Schedule of the DDA, the HCJ held that the failure of the chemist to state the weight of every representative sample of the drugs found in their respective packets was fatal to the prosecution's case. The HCJ concluded that the prosecution could not rely on the presumption of trafficking under s. 37(da)(iv) of the DDA and the appellant was discharged and acquitted. However, that decision was

reversed and the HCJ was ordered to hear the appellant's defence. The appellant gave evidence under oath and denied knowledge of the drugs and that there was an alleged break in the chain of evidence pertaining to the drugs sent to the chemist. The investigating officer's ('PW11') evidence pertaining to the drug exhibits showed that despite PW11 saying that there was only one envelope AZ which he sealed, the evidence of the chemist showed that there were two, both had PDRM seals on them but one of it had been cut opened, which raised the issue of a serious doubt on the identity of the drugs seized.

Held (allowing appeal)

Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) The HCJ had traced the handling of the exhibits from PW3 to PW11 and then to the chemist. The handling of the exhibits from the relevant witnesses to others as described by the HCJ did not explain the existence of the cut opened envelope sent to the chemist and could not in any way remove the probability that the drug exhibits had been tampered with. With the evidence of the chemist, the identity of the subject matter of the charge had been compromised. Such probability was a serious breach which warranted an acquittal for the appellant because it obviously raised a serious doubt about the sanctity of the very exhibit which formed the substance of the charge and the death penalty that ensued. The conviction against the appellant was anything but safe. The conviction and sentence of the appellant were thus set aside and substituted with an order of discharge and acquittal (paras 16 & 18)

Case(s) referred to:

Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Lew Wai Loon v. PP [2014] 2 CLJ 649 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(da)(iv), (j), 39B
Penal Code, s. 34

For the appellant - Roland Thomas Tudin; M/s Roland Thomas Advocs
For the respondent - Muhammad Azmi Mashud; DPP

[Editor's note: Appeal from High Court, Kuching; Criminal Trial No: KCH-46A-1/8-2015 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Rhodzariah Bujang JCA:

[1] The appellant, who was an assistant registration clerk with National Registration Department, was charged and convicted by the High Court in Kuching for trafficking in 956.06g of cannabis under s. 39B of the Dangerous Drugs Act 1952 ("DDA") and sentenced to death for the said offence. He

was originally charged together with his wife for the said offence but the charge was withdrawn by the prosecution against the latter on the day of trial. After the said withdrawal and removal of the element of common intention under s. 34 of the Penal Code, the charge against the appellant reads:

> That you, on 29th day of January, 2015, at about 12.05a.m. at No. SL 14 LT 1363, Jalan Bako Taman Siol Ria, in the District of Kuching, in the State of Sarawak, did traffic in dangerous drugs, to wit, 956.06 grams of cannabis, and thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act, 1952 punishable under section 39B(2) of the same Act.

The Earlier Acquittal

[2] That conviction of the appellant was actually preceded earlier by his acquittal at the close of the prosecution's case but on appeal to this court, that decision was reversed and the learned High Court Judge was ordered to hear the appellant's defence. It is now an opportune time for us to lay out the prosecution's case and the reasons given by Her Ladyship for making the said order of acquittal.

The Prosecution's Case

[3] The discovery of the said drugs was upon a raid conducted at the appellant's house at about 11pm on the date and at the address as stated in the charge by Insp Khairul Faiz (PW3) and six other police personnel. Three of these personnel gave evidence in court, that is, PW6 (Cpl Muhamad Awis Qurni bin Ab Wahab), PW8 (Cpl Razali) and PW10 (ASP Masitah) whilst the other three were offered to the defence at the close of the prosecution's case. At the time of the raid, the appellant, his wife and two children, aged three years and one and half years old, respectively were in the house. The raiding party had to force open the front door of the house by kicking it open following the appellant's refusal to open it and in spite of PW3 identifying himself as a police personnel. The appellant and his family were later found by the raiding party in the master bedroom. A search of that bedroom by PW10 revealed the said drugs in one transparent plastic packet on top of a sink in the bedroom and in another translucent plastic as well as 27 transparent plastic packets which were found in a box with the brand "Borneo Drinking Water". In another room facing the bedroom, another 30 plastic packets containing the drugs was found in a drawer which was were placed on the lower bunk of a double-decker bed.

[4] The appellant's wife was called to give evidence by the prosecution as its ninth witness (PW9). She confirmed that only the appellant, herself and their children occupied the house and given her evidence that she knew nothing about the drugs, the learned High Court Judge held that the appellant had possession of the same. This Her Ladyship found based on the conduct

of the appellant who saw PW3 and his team outside the house when peeping through the curtain but yet still refused to open the door despite PW3 identifying himself as a police officer. Instead, the appellant was seen running upstairs and according to PW3 when the drugs were found in the house the appellant looked frightened. So Her Ladyship was satisfied that the element of possession, namely, knowledge of the nature of things possessed, the power of disposal over the things and the consciousness of possession of the things – as laid down in *Chan Pean Leon v. PP* [1956] 1 LNS 17, *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 had been established.

[5] However, on the ingredient of the charge that the drugs found were dangerous drugs as stated in the First Schedule of the DDA, the learned High Court Judge held that the failure of the chemist (PW1) to state the weight of every representative samples of the drugs found in their respective packets was fatal to the prosecution case. This Her Ladyship found despite the chemist saying that a 100 percent visual examination of the plant materials found in the respective packages showed that they were cannabis because of the presence of glandular hair or crystolith hair. That weight, according to Her Ladyship was vital to attract the presumption under s. 37(j) of the DDA which reads as follows:

> **Section 37. Presumptions**
>
> In all proceedings under this Act or any regulation made thereunder:
>
> (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten percentum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug;

Therefore, concluded the learned High Court Judge, the prosecution cannot rely on the presumption of trafficking under s. 37(da)(iv) of the DDA and the appellant was discharged and acquitted by her accordingly.

[6] As mentioned earlier, that decision was reversed and in his defence, the appellant gave evidence under oath as well as called two other witnesses, that is his stepfather (DW2) and his brother-in-law (DW3). In short, the appellant in his testimony denied knowledge of the drugs and claimed that his house was accessible to his futsal team committee members, as well as workers of his food stall business. He explained his reaction of running up

the staircase upon seeing the raiding team was because his son was crying upstairs and when they came in and handcuffed him whilst he was still carrying his son, Sgt Razali allegedly said to him in local Sarawak Malay "kau sik akan lepas kali tok, kamek orang akan kenak kau habis-habisan jika kau mau isteri kau lepas". The appellant claimed that whilst PW10 searched the master bedroom and PW8 together with PW6 searched the opposite rooms, he was sitting at the staircase outside the master bedroom. No drugs were found in that other room, he said.

[7] The appellant also alleged that the drugs were planted by an informer or the raiding team. He claimed that PW10 had an axe to grind against him because he was once arrested in 2008 and despite her asking him to admit to the possession of the items found, he refused and was subsequently acquitted of the charge. She allegedly told him at the raid also in local Sarawak Malay that "kali ini kau akan kenak oleh kamek orang berserta dengan isteri kau." It must be noted straight away that this allegation of a frame-up by the police was never put to the PW8 and PW10 as well as PW9 by the appellant's counsel when they gave evidence and the learned High Court Judge had rightly rejected it. Her Ladyship was equally right when she said there was no cogent evidence why the police would want to frame him up for there was nothing significant about his earlier arrest which would prompt the police to do so.

[8] The appellant also attempted to disassociate himself from the drugs by saying that there was a possibility that his house was broken into when it was left empty over the weekends when they stayed in his in-laws' place. That was obviously and clearly an untenable defence for which imbecile would want to leave drugs in a house he had broken into.

[9] The evidence of DW2 and DW3 in essence corroborated that of the appellant that he was handcuffed and sitting at the staircase when the raiding team was in the house for that was where the said witnesses found him when they arrived at the house after receiving calls from the appellant's wife about the raid. We made a deliberate decision not to go into the details of their evidence because after hearing the submissions of learned counsel for the appellant and the learned Deputy Public Prosecutor ("DPP") we have decided to allow the appeal on the sole issue of a serious doubt on the identity of the drugs seized. However, before delving into the said issue, we would first address this pertinent point raised by the learned DPP, which is that it was no longer open to the appellant to canvass the said issue before us because the previous panel of this court had found a *prima facie* case against the appellant. If, submitted the learned DPP, the chain of evidence had been broken as alleged by learned counsel for the appellant, his defence would not have been called and this shows that the issue had been considered by the previous panel.

[10] With respect we were not able to accede to the argument because of the following reason:

> The previous appeal was in respect of the acquittal of the appellant which was solely on the ground of the insufficiency of the chemist evidence as stated earlier. It was definitely not on the issue of the chain of exhibit which seriously impinged on the identity of the exhibit as submitted by learned counsel before us, since the judgment then was in his client's favour, he need not raise it in the appeal. Obviously too the Public Prosecutor in that appeal did not raise the said issue because there was no adverse finding by the learned High Court Judge that there was such a doubt because of a break in the said chain of evidence.

[11] In the given circumstances of this case, the appellant could not be stopped from raising the said issue after he was ordered to enter his defence and which he did before the learned High Court Judge and Her Ladyship's evaluation and finding on this is at paras. 43-63 of her judgment which will be alluded to later.

Break In The Chain Of Evidence

[12] On this issue, it is instructive to refer to the Federal Court's decision in *Lew Wai Loon v. PP* [2014] 2 CLJ 649; [2014] 3 MLJ 325 where the same issue of the doubt on the identity of the exhibit was raised. Richard Malanjum CJ (Sabah and Sarawak) held as follows at pp. 658-659 (CLJ); p. 334 (MLJ) thereof:

> [25] In considering the contention of learned counsel for the appellant it is essential to first appreciate that an exhibit, perceivable by the senses and as distinguished from testimony, is part and parcel of evidence adduced during a trial. (see *R v. Uxbridge Justices, Ex parte Sofaer & Another* (1986) 85 Cr App R 367; *Butera v. Director of Public Prosecutions* (1987) 62 ALJR 7; *R v. Stipendiary Magistrate at Lambeth & Another, Ex parte McComb* [1983] 1 All ER 321.) It is real evidence as opposed to demonstrative or testimonial evidence. And evidence is the means by which a fact in issue is proved (see *R v. Virtue* [1973] 2 WLR 209: *Thompson v. R* [1918] AC 221). Further, before an exhibit is admitted into evidence the foundation for its admission must be established. Such foundation may be in the form of a fact or event that occurred and providing the reliability and trustworthiness of the exhibit as a piece of evidence (see *R v. Nikolovski* [1996] 3 SCR 1197 (Canada)).
>
> [26] *In other words, an exhibit, in a criminal or a civil trial, is physical or documentary evidence brought before the court. Its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant not only for its admission as a piece of evidence but that such facts and/or events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. In short it is a fact sensitive exercise.*

[27] Accordingly in the present case, we would say that discrepancies in weight alone of an exhibit such as drug should not *ipso facto* cast doubt on its identity. There are other primary factors to consider such as the facts and/or events that form the foundation for its admission as a piece of evidence. *One fact and/or event to consider is whether there is any break in the handling or custody, which tantamount to a break in the chain of evidence. If such event occurred then that should cast a doubt in the exhibit as a reliable and trustworthy piece of evidence. (see Su Ah Ping v. Public Prosecutor [1980] 1 MLJ 75; Eng Sin v. Public Prosecutor [1974] 2 MLJ 168*). (emphasis added)

[13] As indicated earlier, the alleged break in the chain of evidence was pertaining to the drugs sent to the chemist. The investigating officer's (PW11) evidence pertaining to the drug exhibits which have been reproduced in the written submission of the appellant are these:

Q: Do you remember the markings that you put on all the exhibits?

A: Yes. The exhibit that was inside envelope AZ, I marked one plastic packet containing compressed dried leaves with A1, date and signature. The envelope marked AZ1, all the exhibits inside the envelope I marked with B1-B25, date and signature. B1 is one block of compressed dried leaves. B2-B25 is for the 24 plastic packets with compressed dried leaves. The envelope marked AZ2, I marked all the plastic packets with C1-C30, date and signature. One Borneo Drinking Water box I marked with B. One box without brand I marked with BB. For the rest of the markings, I pray to refer to my investigation diary.

(See: page 304 of Volume 2(2) of the Appeal Record)

Note question No. 1347.

Q: After D/Corp. Desmond took the photographs, what did you do with the exhibits?

A: I sealed all the exhibits in three envelopes AZ, AZ1, AZ2 with Polis Diraja Malaysia 396 seal. I put the impulse sealer, the weighing scale together with the box, the grinder and the box marked BB into the Borneo Drinking Water box. I wrapped the Borneo Drinking Water box, sealed it with Polis Diraja Malaysia 396 seal and marked it with AZ3. I put the clothing in the locked steel cabinet.

(See: page 307 of Volume 2(2) of the Appeal Record)

Note question No. 1358.

[14] However, the evidence of the chemist (PW1) tells a different story. This was what she said:

Q26: How was the condition of the white colour envelope marked AZ when you received from Insp. Abg Zulkernaen bin Abg Kerni?

It was in good condition and seal was still intact when I received the envelope.

A Q27: What about the second envelope marked AZ?

Even though the second envelope marked AZ having Polis Diraja Malaysia 396 seal, it is already open.

Q28: What do you mean already open?

B As I mentioned earlier, AZ contains two things, one is envelope marked AZ and the other one is the compressed plant material inside the transparent plastic packet marked A1. The second envelope marked AZ did not contain anything.

Q29: What do you mean already open?

C It is already cut.

Q30: What about the condition of one transparent plastic packet marked A1?

The transparent plastic packet is in good condition but it is not sealed and also having the marking A1.

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[15] It is clear from the aforesaid evidence that despite PW11 saying that there was only one envelope AZ which he sealed, the evidence of the chemist shows that there were two, both have PDRM seals on them but one of which had been cut open. The learned High Court Judge, in spite of the above evidence held in para. 49 of her judgment that there was no break in the chain E of the evidence as follows:

49. With respect, I do not agree for the following reason. The chain of handling the seized drugs exhibits, from the time of seizure to handing them over to the chemist, has been clearly established and there was never any suggestion from the defence to the prosecution F witnesses that there was a break in the chain.

[16] Her Ladyship then traced the handling of the exhibits from PW3 to PW11 and then to the chemist which was evidenced by three Form POL 31 (exhs. P2-P4) and the identification of the exhibits in court by PW11. She then concluded at para. 63 as follows:

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63. It can be logically gathered from Exhibits P2, P3 and P4 that PW11 prepared, as well as from the physical identification made by PW11 during the trial in court, that all the envelopes marked Exhibits, AZ, AZ(1), AZ1, AZ1(a), AZ2 and AZ2(a) were prepared by PW11. It, therefore, rules out any aspersion of tampering and break in the H chain of evidence as submitted by the defence.

[17] Exhibits P2-P4 are the three Form POL 31 prepared by PW11 with respect to the submission of the exhibits to the chemist. With respect to the learned High Court Judge, the handling of the exhibits from the said witness to the others as described by her above does not explain the existence of the I cut-opened envelope sent to the chemist and could not in any way remove

the probability that the drug exhibits had been tampered with. In other words, with the evidence of the chemist as reproduced above, the identity of the subject matter of the charge has been compromised. Such probability is in our view a serious breach which warrants an acquittal for the appellant because it obviously raised a serious doubt about the sanctity of the very exhibit which forms the substance of the charge and the death penalty that ensued. The conviction against the appellant was anything but safe.

[18] For completeness, we would also address another point raised on this issue by learned counsel for the appellant and this pertains to the evidence of the chemist who said one plastic packet containing the drugs marked A1 which was not sealed. The said packet had earlier been marked by PW3 as K1 and when it was found in the house by PW6, the said packet was heat-sealed and still intact. With respect, there is a difference between "sealed" and "heat-sealed" spoken off by the witness. The chemist was referring to exhibits sent to her which had been officially sealed by the investigating officer and not the original condition of the packet of drugs when it was found which, naturally for the purpose of sale or distribution had to be heat-sealed. However, for the reasons given earlier the appeal was allowed, the conviction and sentence of the appellant were set aside and substituted with an order of discharge and acquittal.